

1 KATHERINE JOHNSON (CA SBN 259854)  
2 CASPER J. RANKIN (CA SBN 249196)  
3 JOSEPH C. DELMOTTE (CA SBN 259460)  
4 PITE DUNCAN, LLP  
5 4375 Jutland Drive, Suite 200  
6 P.O. Box 17933  
7 San Diego, CA 92177-0933  
8 Telephone: (858) 750-7600  
9 Facsimile: (619) 590-1385

10 Attorneys for US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR WFASC 2005-  
11 AR14

12 UNITED STATES BANKRUPTCY COURT  
13  
14 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

15 In re

16 EDILBERTO A. SOLIVEN AND SHIRLEY  
17 M. SOLIVEN,

18 Debtor(s).

Case No.09-72349-EDJ

Chapter 7

R.S. No. CJR-497

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

DATE: February 19, 2010  
TIME: 10:00AM  
CTRM: 215

1300 Clay Street  
Oakland, CA 94604-1426

19 US Bank National Association, as Trustee for WFASC 2005-AR14 ("Movant"), moves  
20 this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that  
21 Movant may commence and continue all acts necessary to enforce its security interest in real  
22 property generally described as 1617 Saintsbury Drive, Las Vegas, Nevada 89144.

23 On or about December 24, 2009, Edilberto A. Soliven and Shirley M. Soliven  
24 ("Debtors") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Lois I.  
25 Brady was appointed as Chapter 7 Trustee. As a result of said filing, certain acts and  
26 proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C.  
27 § 362.

28 //.

1 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and  
2 362(d)(2).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
6 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

7 **NO EQUITY**

8 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the  
9 debtor does not have any equity in the property and the property is not necessary to the debtor's  
10 effective reorganization.

11 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:  
12 § 362(d)(2) reflects congressional intent to allow creditors to  
13 immediately proceed against the property where the debtor has no  
14 equity and it is unnecessary to the reorganization, even where the  
debtor can provide adequate protection under § 362(d)(1).  
(Emphasis added).

15 Id. at 610 (emphasis added).

16 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court  
17 stated that in determining whether equity exists in the property for purposes of § 362(d)(2), all  
18 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief  
19 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194  
20 (9th Cir. 1984).

21 An appropriate cost of sale factor should also be added to determine if the debtor has  
22 any equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R.  
23 283, 289 (Bankr. S.D. Cal. 1982).

24 On or about April 13, 2005, Debtors, for valuable consideration, made, executed and  
25 delivered to Wells Fargo Bank, N.A. ("Lender") a Note in the principal sum of \$690,000.00  
26 (the "Note"). Pursuant to the Note, Debtors are obligated to make monthly principal and interest  
27 payments commencing June 1, 2005, and continuing until May 1, 2035, when all outstanding  
28 amounts are due and payable. The Note provides that, in the event of default, the holder of the

1 Note has the option of declaring all unpaid sums immediately due and payable. A true and  
2 correct copy of the Note is attached to the Declaration in Support of Motion for Relief From  
3 Automatic Stay as exhibit A and incorporated herein by reference.

4 On or about April 13, 2005, the Debtors made, executed and delivered to Lender a Deed  
5 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly  
6 described as 1617 Saintsbury Drive, Las Vegas, Nevada 89144 (the "Real Property"), which is  
7 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and  
8 costs incurred as a result of the Debtors' bankruptcy case may be included in the outstanding  
9 balance under the Note. The Deed of Trust was recorded on April 21, 2005, in the Official  
10 Records of Clark County, State of Nevada. A true and correct copy of the Deed of Trust is  
11 attached to the Declaration in Support of Motion for Relief From Automatic Stay as exhibit B  
12 and incorporated herein by reference.

13 Subsequently, all beneficial interest in the Deed of Trust was sold, assigned and  
14 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust  
15 evidencing the Assignment of the Deed of Trust to Movant is attached to the Declaration in  
16 Support of Motion for Relief From Automatic Stay as exhibit C and incorporated herein by  
17 reference.

18 The obligation under the Note is in default as of January 1, 2009, for failure to make  
19 payments to Movant. As of January 15, 2009, the total obligation due and owing under the Note  
20 is in the approximate amount of \$750,402.60, representing the principal balance of  
21 \$689,861.70, interest in the sum of \$45,461.40, late charges in the amount of \$1,350.96, escrow  
22 advances in the amount of \$10,530.12, and a recoverable balance in the amount of \$3,198.42.  
23 This is an approximate amount for purposes of this Motion only, and should not be relied upon  
24 as such to pay off the subject loan as interest and additional advances may come due subsequent  
25 to the filing of the Motion. An exact payoff amount can be obtained by contacting Movant's  
26 counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in  
27 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate  
28 sum of \$68,006.68, excluding the post-petition attorneys' fees and costs incurred in filing the

1 instant Motion. A true and correct copy of the contractual payment accounting pursuant to  
2 Local Rule 4001-1(g)(1) is attached to the Declaration in Support of Motion for Relief From  
3 Automatic Stay as exhibit D and incorporated herein by reference.

4 **II.**

5 **RELIEF FROM STAY**

6 **LACK OF EQUITY**

7 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and  
8 Statements, the fair market value of the Property is approximately \$625,000.00. True and  
9 correct copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to  
10 the Declaration in Support of Motion for Relief From Automatic Stay as exhibit E and  
11 incorporated herein by reference.

12 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$625,000.00
Less:	
Movant's Trust Deed	\$750,402.60
Clark County Tax Collector's Trust Deed	\$1,000.00
Costs of Sale (8%)	\$50,000.00
Equity in the Property:	\$<176,402.60>

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16  
17 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since  
18 this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is  
19 entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

20 **III.**

21 **MOVANT IS ENTITLED TO RELIEF FROM THE**  
22 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

23 **CAUSE - LACK OF ADEQUATE PROTECTION**

24 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to  
25 adequate protection of its interest in the Property.

26 ///

27 ///

28 ///

1 Movant submits that adequate protection in this case requires normal and periodic cash  
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed  
3 to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtors are presently unwilling or unable to  
5 provide adequate protection to the Movant and there is no probability that adequate protection  
6 can be afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.  
8 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the  
11 enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of  
12 Trust;

13 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

14 3. Granting Movant leave to foreclose on the Real Property and to enforce the  
15 security interest under the Note and the Deed of Trust, including any action necessary to obtain  
16 possession of the Property;

17 4. Permitting Movant to offer and provide Debtors with information re: a potential  
18 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan  
19 Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtors;

20 5. Alternatively, in the event this court declines to grant Movant the relief requested  
21 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to  
22 reinstate and maintain in a current condition all obligations due under the Note and Deed of  
23 Trust and all other deeds of trust encumbering the Real Property, including Debtors' obligations  
24 to pay when due (a) the monthly installments of principal and interest, as required under the  
25 Note; (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors  
26 in order to protect Movant's interest in the Real Property, including all attorneys' fees and costs  
27 incurred in the filing of this motion;

28 /././

1           6.           That the attorneys' fees and costs incurred by Movant for filing the instant Motion  
2 be included in the outstanding balance of the Note as allowed under applicable non-bankruptcy  
3 law; and

4           7.           For such other and further relief as the court deems just and proper.  
5

6 Dated: January 26, 2010

PITE DUNCAN, LLP

8                               /s/ CASPER J. RANKIN (CA SBN 249196)  
9                               Attorneys for US BANK NATIONAL  
10                              ASSOCIATION, AS TRUSTEE FOR WFASC  
11                              2005-AR14  
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